OCTOBER TERM, 1897.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Limited, as CHARLES A. LYNDE, Deceased,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF CHARLES R. LYNDE, DECEASED,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This was a foreclosure suit brought in 1891, in the Common Pleas Court of Franklin County, Ohio, by Lynde, who claimed to be the owner of thirty-six of the second mortgage bonds of The Columbus & Indianapolis Central Railway Company, for one thousand dollars each, dated November 1st, 1864, together with the semi-annual interest coupons, maturing May 1st, 1879, and thereafter down to the commencement of the suit, secured by mortgage on the railway, extending from Columbus, Ohio, to Indianapolis, Indiana, which is now owned by plaintiff in error, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The petition (printed record, p. 6), made defendants with others, Archibald Parkhurst, trustee of the bonds, The Columbus, Chicago & Indiana Central Railway Company, corporate successors of the alleged maker of the bonds, and the plaintiff in error here, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Parkhurst and the C., C. & I. C. R'y Co. made default.

The P., C., C. & St. L. R'y Co. answered (p. 12 and 23), denying that the instruments in question were ever made or issued by the alleged maker or either of its corporate successors, and denying that they ever became a lien upon the railway property.

The answer further (printed record, p. 14) set out the proceedings in a former foreclosure suit in the U. S. Circuit Courts for Ohio and Indiana, in. which the railroad was sold and the property thereafter passed by successive conveyances to its present owner, the answering defendant.

The answer further averred that the alleged lien of the plaintiff, if acquired at all, was acquired during the pendency of that foreclosure suit, and while the railroad was in the custody of the Court, by its receivers, and by virtue of the proceedings and sale in that suit such pretended lien was extinguished.

By this answer the plaintiff in error claimed the legal effect of the decree of foreclosure and sale to be the extinguishment of plaintiff's alleged lien on its property.

To this answer a reply was filed in the nature of a general denial, and further alleging that Lynde was a bona fide purchaser for value without notice (p. 20).

The trial Court found in favor of the plaintiff's lien, and decreed a sale of the road for the payment of his bonds. The Court found the facts and its conclusions of law separately and made its finding part of the record (p. 24), and to review the questions of law the case was taken to the State Circuit Court and to the Supreme Court, where the judgment of the trial Court was affirmed in the opinion forming part of the record (page 54).

The State Court thus denied to the decree and proceedings in foreclosure of the Federal Courts the legal effect claimed for them by the plaintiff in error, and made a case where a title or right is claimed under an authority exercised under the United States, and the decision of the State Court was in denial of the title or right so asserted.

A brief history of the case, as disclosed by the record, is as follows:

On the 1st of November, 1864, the Columbus and Indianapolis Central Railway Company, a corporation of Ohio and Indiana, prepared, signed and sealed its one thousand bonds of $1,000.00 each, payable to William D. Thompson, or bearer, on the 1st day of November, A. D. 1904, with coupons annexed for the semi-annual interest, and to secure their payment, executed a second mortgage upon its entire line from Columbus to Indianapolis, to Archibald Parkhurst, trustee (p. 24, 25).

Shortly after the one thousand bonds of the issue in question were signed and sealed, they were all duly certified by the trustee, and prior to January 1, 1867, seven hundred and ninety of them had been exchanged

as provided in the mortgage, and thirty-one had been duly sold. (p. 31.) The remaining one hundred and seventy-nine bonds, including all of the thirty-six bonds in suit, had been sometime prior to 1870, delivered by Parkhurst, the trustee, to B. E. Smith, as President of the company, and remained *unissued* in his possession as President of the maker company and of the companies into which it was afterwards consolidated, until November and December, 1875. (p. 31.)

In September, 1867, the Columbus and Indianapolis Central Railway Company, maker of the bonds, was consolidated with other roads into and became the Columbus and Indiana Central Railway Company (p. 31), and again in February, 1868, this latter company was consolidated with another, and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants, which we will hereafter designate as the C., C. & I. C. Co. (p. 31, 32.)

On the 20th of February, 1868, the C., C. & I. C. Co. made its mortgage on its line, including the property in question, to Roosevelt & Fosdick, trustees, to secure an issue of $15,000,000.00 of bonds, of which bonds to the amount of more than ten million dollars, were sold. (p. 32.)

About the 15th of December, 1868, the same company made another mortgage to Fowler & Thomas, Trustees, to secure an issue of $5,000,000.00 of bonds. (p. 32). This mortgage recited that the company was indebted for outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company in the sum of $821,000.00, and bonds of the $5,000,000.-00 issue were to be set aside, appropriated and used

for the sole purpose of taking up these and certain other specified bonds. (p. 32).

The 821 bonds above mentioned were those secured by the Parkhurst mortgage in question, and which were all of that issue which had been put out. (p. 32).

About the 22nd day of January, 1869, the C., C. & I. C. Ry. Co., leased its entire line to the Pittsburgh, Cincinnati & St. Louis Ry. Co. for 99 years, renewable forever, which latter road took possession and operated it until the sale under foreclosure, mentioned hereafter. (p. 33).

The lease provided that out of the rentals there should be paid the interest on the $15,000,000.00 and the $5,000,000.00 issue, and upon certain income bonds thereafter to be issued not to exceed $2,000,000.00. (p. 33).

It was further provided in the lease that no issue of bonds beyond the three last named should be made by the lessor company without the consent of the boards of directors of the respective parties to the lease. (p. 31). Thereafter no consent was ever given by the board of directors of C., C. & I. C. Co., to the issue or sale of the one-hundred and seventy-nine bonds (which include the plaintiff's thirty-six) or of any of them. (p. 34.)

On the 1st and 2nd days of February, 1875, in the U. S. Circuit Courts for Ohio, Indiana and Illinois, Roosevelt and Fosdick, trustees, commenced action for the foreclosure of their mortgage, making the Railway Company and the Trustees under the Fowler and Thomas mortgage, and others, defendants, but not making Parkhurst a party in respect to his prior mort-

gage, and not seeking to have the road sold free of the Parkhurst mortgage in question. (p. 34). At the same time the plaintiffs moved for the appointment of a receiver or receivers to take possession of the property, and out of the rentals to pay the interest on the bonds issued under their mortgage and the underlying mortgages, etc. (p. 34.)

On the 2nd and 3rd of February, 1875, Roosevelt and Fosdick were themselves appointed receivers, and the Railway Company was ordered by the Courts to forthwith transfer and convey to the receivers all the mortgaged premises which was done on the 25th of May thereafter. (p. 35).

It is important to have the situation at this point definitely fixed in the mind.

The one hundred and seventy-nine bonds, including the thirty-six in suit, had never been issued or delivered to any one, and the intention to use them had been abandoned. The maker had long since gone out of existence by the consolidations of 1867–8.

A mortgage (to Fowler and Thomas) had been put upon the property, subject to the lien of the 821 issued bonds, and no more. In the lease, the lessor company had provided for the payment, by the lessee, of the interest on these 821 bonds, and had bound itself not to issue any more bonds of any sort without the consent of the board of directors of both companies, which was never given. Beyond this the property was now in the custody of the law by proceedings of which all the world was bound to take notice. Under those proceedings the legal title to all the property had been conveyed to the receivers to protect it from any dispo-

sition to the prejudice of the Roosevelt and Fosdick mortgage and the holders of bonds thereunder. The Court had taken it into possession for that express purpose.

The situation above set forth continued until the months of November and December of that year (1875), in which month one B. E. Smith, who had during this time been President of the C., C. & I. C. Co., and its predecessors, borrowed upon his own notes, and for his own purposes, the sum of $48,000 of the Newbolds in Philadelphia, and needing collateral for the same, he resurrected these one hundred and seventy-nine unissued bonds, cut off and suppressed all past due coupons, and falsely pretending to the Newbolds that they were his individual property, pledged a part of them, including the thirty-six in suit, as collateral security for his loan—all without the knowledge or consent of the Railway Company. (pp. 37–38).

Smith renewed his notes from time to time, receiving from the Newbolds the coupons as they come due, and suppressing them, till January 14, 1878, when the Newbold's under their collateral contract, sold the bonds, applying the proceeds to the payment of the loan, and paying the balance to Smith.

No part of the proceeds was ever used for the benefit of the Railway Company. (p. 38.)

The Newbolds themselves bought the bonds, and soon after sent them for sale, to New York, where plaintiff, in May, July and August, 1878, bought them in the usual course of business, without any knowledge of their infirmity. (p. 38.)

Soon after his purchase, August 27, 1878, the plaintiff caused them to be registered in his name by the Secretary of the Union Trust Company, the Registrar, who made no inquiry with regard to their origin. (p. 39.)

Afterward, A. Iselin & Company, acting for the receivers and for the bondholders' committee, paid Mr. Lynde the coupons for May 1, and November 1, 1878, having no knowledge at the time, that these bonds had not been regularly issued by the Railway Company. The money to pay the coupons was furnished by the bondholders' committee, who were afterwards re-imbursed by the Receivers. (p. 39.) Before another coupon was presented for payment the fraud came to light, and when plaintiff, in October, 1879, presented his coupons due May 1, 1879, for payment, he was refused. And this was the first knowledge he had that all was not right with these bonds. (p. 39.)

From 1871 until plaintiff purchased the bonds in question, he held some of the 821 valid bonds of this issue, on all of which the Railway Company defaulted in payment of the interest due May and November, 1875, and it was not paid till after June 30, 1876, when it was paid by the Receivers, all of which facts were known to the plaintiff when he purchased the bonds in question. (p. 39.)

No further change occurred in the situation, and on the 15-23 days of November, 1882, decrees of foreclosure were entered in the Roosevelt and Fosdick suits for the non-payment of the interest on their bonds. (p. 35.)

[To follow page 9 and precede "The Law of the Case."]

ASSIGNMENT OF ERROR.

The Supreme Court of Ohio has not given due effect to the decrees and proceedings in the Circuit Court of the United States for the Southern District of Ohio, for the District of Indiana and for the Northern District of Illinois in the suit of *James A. Roosevelt & Wm. R. Fosdick* v. *Columbus, Chicago & Indiana Central Ry. Co. et al.*, mentioned in the third defense and cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and relied on by said Company as a defense to the present suit, because the Supreme Court of Ohio, contrary to said decrees and proceedings, has recognized as paramount, in favor of one claiming under a party to these decrees and against the purchaser thereunder, a lien which did not exist at the commencement of those suits, but which was created, if at all, during their pendency.

In the decree of foreclosure it was ordered that the property be sold subject to the outstanding sectional bonds prior in lien to the Roosevelt and Fosdick mortgage, and to all other paramount liens thereon, but free from the liens then represented by any party to the cause, and that the purchaser should hold, possess and enjoy said property "*as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same.*" (p. 36.)

And it was further decreed that by the sale to be made, "the defendants in said suits respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of said suits* by the said Roosevelt and Fosdick *as purchasers, incumbrances or otherwise* howsoever, should be and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold, and every or any part thereof." (p. 36.)

The property was duly sold, the proceeds being insufficient to pay the bonds issued under the Roosevelt and Fosdick mortgage, and, of course, not reaching the bonds issued under the Fowler and Thomas mortgage. (p. 36.)

Afterwards by successive conveyances and a consolidation, the property duly came into the possession and ownership of the P., C., C. & St. L. Railway Company, plaintiff in error, and remained in its undisputed possession until the commencement of this suit. (p. 36-37.)

THE LAW OF THE CASE.

FIRST.

THE JURISDICTION OF THIS COURT.

A preliminary question was raised by the motion of defendant to dismiss the writ of error for want of jurisdiction in that no federal question is presented in the record.

When this action was instituted plaintiff in error at the first moment possible invoked the decree and sale by the Federal Courts of Ohio and Indiana as a protection to its property from the lien claimed by Lynde and never ceased to urge it upon the Ohio Courts.

(See Third Defense of its Answer, Record, p. 14-20.

The trial Court found the facts to be substantially as set out in the Answer, but denied it the effect claimed.

This made "a case in which a title or right is claimed under an authority exercised under the United States and the decision of the State Court being in denial of the title or right so asserted," jurisdiction is conferred upon this Court by Sec. 709 of the Revised Statutes.

Dupasseur v. *Rochereau*, 21 Wal., 130.

In the case of *Embry* v. *Palmer*, 107 U. S., 3, the Connecticut Court enjoined the collection of a judgment rendered in the Supreme Court of the District of Columbia on the ground that it had been obtained under circumstances amounting to fraud.

The facts were found and made part of the record. This Court reversed the judgment of the Connecticut Court for the reason that the facts found disclosed no ground which upon principles applying to all Courts of

Equity will warrant such Court in enjoining the collection of a judgment recovered at law.

In this Court it was held:

First, that the judgments of the Courts of the United States are upon the same footing so far as concerns the obligation created by them, with domestic judgments of the States (page 10.)

Second, that the rule for determining what effect shall be given to such judgments need not depend upon any principle peculiar to the locality where the judgment was rendered, but upon general principles applicable to the judgments of Courts in general. (p. 11.)

It was further held in that case that inasmuch as upon general principles of equity jurisprudence the judgment of the District of Columbia Court could not be enjoined upon the facts found by the Connecticut Court, the latter Court had not given the judgment "that due effect to which under the Constitution and laws of the United States it is entitled" (p. 19.)

In the case of *Buck* v. *Colbath*, 3 Wal., 334, a United States Marshal was sued in trespass for taking the goods of a third person under a writ of attachment. He pleaded the authority of his writ. The State Court denied his plea and the cause was brought here. This Court held that it was clearly within its jurisdiction to review the action of the State Court and affirmed the judgment below.

See, also, *Crescent Live Stock Co.*, v. *Butchers' Union*, 120 U. S., 141, which seems decisive.
Also, *Huntington* v. *Attrill*, 146 U. S., 657.
Laing v. *Rigney*, 160 U. S., 531.

In the case at bar the trial Court found that at the time the foreclosure suit was instituted in the Federal Court, and that Court took possession of the railroad and caused it to be duly conveyed to its receivers, the bonds in question had not been issued, and that the property was then incumbered in respect to the Parkhurst mortgage to the extent of only $821,000. Upon this state of fact the defendant below claimed that no lien could be acquired upon the property while it was so in the custody of the law, and that the due and legal effect of the decree and sale was to pass the title free from any lien in respect to the plaintiff's bonds.

Upon the authority of the cases we have cited, the denial of this claim by the State Court brings the case as we think clearly within the jurisdiction conferred by the Statute upon this Court.

It is urged by counsel for defendant in error that as Mr Lynde was not a party to the foreclosure suit this is not a case "where the State Court refused to give effect to the judgment of a Court of the United States, rendered upon a point in dispute and with jurisdiction of the case and the parties." But the judgment of the Court is as conclusive upon parties acquiring an interest *pendente lite* as upon the parties to the litigation.

Furthermore, this is not a case for the application alone of the doctrine of constructive notice involved in the rule of *lis pendens*. The Federal Court, through its receiver, was in actual possession of the *res*. In such case it is held that a sale of real estate while in the possession of receivers upon a paper levy made

before the receivership passes no title to the purchaser whatsoever but is absolutely void.

Wiswall v. *Sampson*, 14 How., 52.

Furthermore the petition of opposite counsel begs the very question at issue upon the merits, viz.: whether Mr. Lynde, notwithstanding he was not a party to the foreclosure suit, was, nevertheless, in respect to his claim to a lien upon the real estate, bound by the decree and sale.

It is, therefore, no objection to the jurisdiction of this Court that Mr. Lynde was not a party to the foreclosure suit.

SECOND.

THE MERITS OF THE CASE.

First—The defendant below, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, having acquired the title to the property, stood in the shoes of the purchaser at the Judicial sale, and was entitled to defeat the claim of the plaintiff against its property —the only matter in which it was interested—by showing either that the bonds were not valid obligations or that the holder, plaintiff below, was not entitled to a lien for their enforcement.

Jones on Corporate Bonds and Mortgages, Sec. 683.

Hackensack Water Co. v. *DeKay*, 36 N. J., Eq. 548, 555.

Second—The bonds in question never had a legal existence as contractual obligations. The alleged maker had become defunct prior to 1875 when the bonds were first hypothecated by Smith.

The bonds purport to have been made by The Columbus & Indianapolis Central Railway Company in 1864, but were not issued by that company. In 1867 this corporation was consolidated with others forming a new corporation, viz., The Columbus & Indiana Central Railway Company. In 1868 this latter corporation consolidated with others forming still a new corporation, viz., The Columbus, Chicago & Indiana Central Railway Company. Upon each of these consolidations the old corporation ceased to exist.

Shields v. *State*, 26 Ohio St., 86, 92.
R. R. v. *Brown*, 26 Ohio St., 223, 239, 240.
Shields v. *Ohio*, 95 U. S., 319, 323.
Ry. Co. v. *Georgia*, 98 U. S., 359, 363-4.
State ex rel. v. *Sherman*, 22 Ohio St., 411, 428.
Compton v. *Ry. Co.*, 45 Ohio St., 592, 615.
Keokuk & West. Ry. Co. v. *Missouri*, 152 U. S., 301.

In *Shields* v. *Ohio*, 95 U. S., 319, 323, a case of corporate consolidation under the Ohio Statute, Mr. Justice SWAYNE says :

"The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All (the old and the new) could not co-exist. It was a

condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution."

True, the old corporation remained alive by a fiction in order to preserve the rights of creditors. *Compton* v. *Ry. Co.*, *supra*. But in respect to the bonds in suit, when these consolidations took effect there was no creditor. They remained undelivered until more than eight years after the last consolidation.

The dissolution of the corporation put an end to Smith's authority to act on its behalf. After its dissolution it could have no agent. There could be no delivery by or on its behalf of bonds which had no inception as obligations to that time. The signatures to them before that time was a mere nullity. It bound nobody and could have been erased or cancelled at any time.

Clark v. *Boyd*, 2 O., 56.

In *Harshman* v. *Bates County*, 92 U. S., 569, a township had been duly authorized to subscribe for the stock of a railroad company, but before the subscription was actually made the railroad company consolidated with another, thereby forming a third. The Supreme Court held that the consolidation terminated the life of the original company, and put an end to the power of the trustees to make the subscription; that the subscription to the consolidated company was illegal, and that the bonds issued in consideration thereof were invalid. Mr. Justice BRADLEY said, p. 575:

"So long as an authority remains unexecuted, the occurrence of any event which creates a revocation in

law will extinguish the power. The extinction of the company in whose favor the subscription was authorized, worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent."

See, also, *Long* v. *Thayey*, 150 U. S., 520.

Nor was the corporation estopped by the fact that the bonds put out by Smith bore date as of a time prior to its dissolution. In *Anthony* v. *County of Jasper*, 101 U. S., 693, 698, WAITE, C. J., said:

"Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he can not bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, can not charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstance partakes of the character of a forgery and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another: Every one who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley* v. *Taber*, 5 Mass., 285, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain date, should be utterly void,

evidence was admissible on behalf of the makers to prove that the notes were issued after that date, although they bore a previous date."

Coler v. *Cleburne*, 131 U. S. 162, was a suit by a bona fide holder of municipal bonds that bore date January 1st, 1884, but were not in fact signed until July 3, 1884. The person who signed them was the Mayor on January 1, 1884, but had gone out of office in April, 1884. He signed under a resolution of the City Council and appended the word "Mayor" to his signature. The Court, following *Anthony* v. *County of Jasper*, and quoting at length the foregoing passage from the opinion of Chief Justice Waite, held that no one could lawfully sign the bonds but the person who was Mayor of the city when they were in fact signed; that the city was not estopped from showing the facts as to the signature, and that the bonds were invalid.

It might be said of these 36 bonds, as was said of the bonds under consideration in *Anthony* v. *County of Jasper*, p. 700: "They were never in fact issued by the proper authorities. They were in legal effect forged."

The case is analogous to that of an executor or administrator issuing commercial paper executed in form, but not delivered, by the decedent.

Bromage v. *Lloyd*, 1 Exch. 32.
Clark v. *Boyd*, 2 O. 56.
1 Daniels on Neg. Inst., Sec. 64.

Mr. Justice Miller in Floyd's Acceptances, 7 Wall, 676, says: "But, in each case, the person dealing with an agent, knowing that he acts only by virtue of a

delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, can not be used to establish the authority by which it was originally issued."

The bonds, not being liabilities of the old company, could only become binding upon the new, by some affirmative act of the new corporation — such as their authorized issue and sale. But there is no pretense that Smith ever had authority from the new company to issue the bonds.

The new corporation never assumed the bonds as its obligations, or in any manner whatsoever recognized or treated them as such. It never authorized their sale or other disposition. Smith, in pledging the bonds, pretended they were his own property. Their proceeds were not paid or loaned to him as president of the company, but to him in his private and individual capacity. The railroad company never received any part of the proceeds of these bonds, or any benefit from them whatever.

As Smith had no authority in fact to dispose of the bonds for the company, it was not the case of an agent acting for or binding an undisclosed principal. As Smith did not pretend to be acting for the company, but for himself alone and the Newbolds so understood it, they did not deal with him on the faith at any supposed agency, and the company was unaffected by his act. *The Board of Education* v. *Sinton*, 41 Ohio

Stat., 504, 513; *Moores* v. *Citizens' National Bank*, 15 Fed. Rep. 141. Affirmed in 111 U. S. 156.

It was alleged in the petition of Mr. Lynde in the Court below (Record, pp. 6 and 7), that the Columbus and Indianapolis Central R'y Co. made and "issued" (delivered) these bonds. This was denied by the answer of plaintiff in error. (p. 12). The facts found by the Court which are no longer in dispute and to which we have referred, show that they were not delivered by that company, nor by any of its successors, nor were they ever delivered by any one acting or pretending to act on behalf of any of them. The case is simply one in which a person possessed himself by crime of pieces of paper purporting on their face to have been made by a corporation through its agents, but which never had a legal existence before the power of the corporation and its agents to act had ceased. We respectfully submit that the dissenting opinion of Spear, J., of the Ohio Court (Record, p. 65) states the law.

Third—No lien could be acquired upon the railroad property while in the hands of the receivers. When the receivers were appointed in February, 1875, and the property was seized by the Federal Court the railroad was encumbered by a lien under the Parkhurst mortgage to the extent of $821,000, and no more.

It must be apparent to any one reading the decree that the Federal Court undertook to pass the title in respect to liens prior to the Roosevelt and Fosdick mortgage *as they stood at the commencement of that suit.* The Court decreed (p. 36) that the property "should be sold subject to the outstanding sectional

bonds prior in lien to the mortgage to said Roosevelt and Fosdick, and to all other if any paramount liens thereon, but free from the lien of said mortgage, to the said Roosevelt and Fosdick, and that nothing in said decree contained should in any manner effect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the right of them and each of them * * * * that the purchaser of said mortgaged premises should in respect of said premises be invested with and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining *as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same,* but free from the liens represented by any party to said cause." It was further "ordered and adjudged that the sale therein decreed to be made and the conveyance after confirmation to be executed and delivered in pursuance of said decree, should be valid and effectual forever, and that thereby the defendants in said suits respectively, *and all persons claiming or to claim under them or any of them subsequent to the beginning of said suits*, by said Roosevelt and Fosdick as purchasers, incumbrancers or otherwise howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof." The sale was duly

made and confirmed and a deed delivered in accordance with the terms of the decree (p. 37.)

The outstanding sectional bonds, prior in lien to the Roosevelt and Fosdick mortgage and subject to which the C. C. & I. C. Ry. Co. held the property at the commencement of that suit were the 821 Parkhurst bonds. Had the property at that time, viz.: when that suit was begun, been sold free of all liens, no one would contend that any part of the proceeds would have been distributed to the bonds in suit, since they were then in the hands of the railway company. Under no theory could they become a lien upon the property till they were hypothecated by Smith eight months after the road went into the hands of the Court.

Now, if the Court intended by its decree to pass the title in respect to the Parkhurst mortgage as the latter stood at the commencement of the suit, there only remains the question as to the power of the Court to effectuate its purpose.

Counsel for defendant in error, in their brief in support of the motion to dismiss, cite several cases to the effect that the doctrine of *lis pendens* does not apply to commercial paper. Counsel for the Railway Company have never questioned that proposition. But the case at bar is not one of commercial paper merely, but is a case of commercial paper secured by mortgage on real property. Mr. Lynde did not begin the action as the holder of bonds to enforce their payment againts the maker or its corporate successors, but on the contrary, the object of the suit was solely to reach and subject to their payment the real property, claimed to have been pledged for their security, but which had

been seized by a Court of Chancery before their issue, and afterward duly sold to the predecessor in title of the plaintiff in error.

The plaintiff in error is not concerned with the rights of Mr. Lynde's executors as to the holders of commercial paper, but is defending its title to the real estate so acquired. It might be conceded that, notwithstanding the theft or embezzlement of the bonds by Smith and their unlawful hypothecation, the innocent holder could recover upon them in an action at law. We might also concede upon the principle announced in the case of *Carpenter* v. *Longan*, 16 Wal., 271, that *as against the maker of the bonds* he might have enforced the lien of his mortgage for their security. That case and others to the same effect deal only with contract rights between the parties. But this does not meet the question at bar, viz.: Whether *as against the Court* which took the railroad into its possession for the sole purpose of preserving it, as it then stood, to answer the claim of its suitor when finally established, could the property in any manner without the consent of the Court, be thereafter encumbered by further burdens having priority over the seizure and defeating its object ?

Upon this, by far the most important question, as we understand it, presented by the record, the cases cited by our opponents seem to furnish no light, and in all the discussions of this case, no authority has yet been found supporting the affirmative of the above proposition.

The question is important inasmuch as in this case it touches the right of an innocent purchaser of commer-

cial securities on the one hand, and on the other it concerns the power of a Court of Chancery to protect its suitors. For it must, we think, be conceded by our opponents that if the plaintiff below prevails, a weakness in the power of Courts of equity will be discovered never heretofore admitted.

The purpose and general effect of appointing receivers are of course too well settled to need extended notice. By it the Court takes the subject matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceedings and until the final disposal of all questions, legal or equitable, involved in the action. The property is a fund in Court to abide the event of the litigation, and if the creditor succeeds in establishing his right to the application of the fund it is the duty of the Court to see that such application is made. To effectuate this the Court will administer it independently of any rights acquired by third persons, pending the litigation.

Wiswall v. *Sampson*, 14 How., 52.

Various devices have been resorted to by the debtor and his creditors to thwart this purpose of the Court and render ineffectual its attempt to administer the property for the benefit of those entitled to it at the time of its seizure, but such devices have uniformly proven fruitless, and the ability of the Court to protect the property for its suitors has in each instance been established. The receiver cannot be disturbed in his possession of the property, no lien by judgment or attachment can be acquired upon it, the receiver cannot be garnisheed, a creditor's bill will not lie against

him, no interest can be acquired in the property by act of the debtor, even by an innocent purchaser.

Wiswall v. *Sampson, supra.*

In the latter case this Court held that while the property was in the hands of a receiver, a sale by the marshal upon execution and a paper levy was absolutely void and conferred no title, even conceding the lien of the execution creditor superior to the claim of the creditor who filed the bill and procured the appointment of the receiver.

The corporation is incapable of annexing any lien to its property or creating any equity against it after it has passed into the hands of a receiver.

Thompson Com. on the Law of Corporations. Secs. 7013, 7060, 7015.

The true principle which governs the Court in the appointment of a receiver is that the fund is in danger.

Orphan Asylum v. *McCartee*, 1 Hopk., 429.

In *Day* v. *Postal Telegraph Co.*, 66 Md., 354, the syllabus on this subject is as follows :

"Where the affairs of an insolvent company have been placed in the hands of a receiver appointed by a Court having jurisdiction of the subject matter, nothing can be done whereby the status of the affairs of that company can be effectually changed or its rights in any way lessened or prejudiced, without the action of the Court."

"A receiver is but the officer or agent of the Court from which he derives his appointment, and his possession is exclusively the possession of the Court; the

property being regarded as in the custody of the law, for the benefit of whoever may be ultimately determined to be entitled to its possession.

"No third party can interfere with the possession of the receiver without leave of the Court, whether such party claims paramount to or under the right which the receivers were appointed to protect."

In *Railway Co.* v. *Lewis*, 81 Texas, 1, it is held that after the receiver is appointed, the property being in *custodia legis*, no lien can follow the property as against the purchaser at the foreclosure sale, which did not exist at the eommencement of the foreclosure suit.

In *Jackson* v. *Laha*, 114 Ill., 287, the Court say, page 295: It would seem an anomaly that a lien adverse to the rights of the receiver could be obtained so as to control the distribution to be made of the fund. "Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and if that could be done in this case it would withdraw the same from the custody of the law or from what is the same thing, the custody of the receiver having the same in possession."

Also *Newport & Covington Bridge Co.* v. *Douglas*, 12 Bush., 673, 708.

Thompson v. *Scott*, 4 Dill., 508.

In the case of *McGowan* v. *Myers*, 66 Iowa, 99, in which a receiver had been appointed of an insolvent debtor's property, the debtor, while the property was in the hands of the receiver, attempted to assign certain interests in it to certain of his creditors. The Court say, p. 104: "We think as the fund was not

the subject of garnishment or seizure in any manner by the creditors, as it was in the hands of the receivers in which Myers" (the debtor) "was a party, and as he made no resistence to the appointment of the receiver and did not appeal from the order of appointment, he had no control over the fund, and no power to direct that it should be paid to one creditor in preference to another. The fund was in the hands of a court of equity, and he had no right to interfere with its equitable distribution."

In *re Merchants' Ins. Co.*, 3 Bliss, p. 162, BLODGETT, J., said, on page 185: "The receiver of a court of chancery is its executive officer, so much so, to all intents and purposes, as a sheriff of a court of law, and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment."

See, also, *Mays* v. *Rose*, Freem. (Miss.) 703, 718; *Schutte* v. *R. R. Co.*, 3 Woods, 692, 712.

In this case a receiver was appointed of a railroad company in a foreclosure suit and operated the railroad. At the end of the suit a large amount of money remained in the hands of the receivers arising from the operation of the road. A judgment creditor of the company intervened, asking to have his judgment paid out of the earnings of the road. BRADLEY, Cir. J., said, p. 712:

"This claim cannot be allowed. The money realized by the receivers is a part of the fund as it stood when the receivers were appointed and put in possession. It is as much a part of the mortgaged premises as are the rails or the cross-ties of the road. It is the product and

fruits of the property, produced since the court took it in hand, for the use of the liens and trusts by which it is bound. The property was taken possession of by the courts by its receivers, in order to preserve it for the use of those liens and trusts. The fruits arising therefrom whilst thus in custody of the court, do not belong to the Jacksonville, Pensacola & Mobile Railroad Company in any such sense as to be liable to any other claims than those of the parties for whose protection the road was taken into custody, and such charges as appertain to its management and administration. It would be a strange doctrine to contend, that the Jacksonville, Pensacola & Mobile Railroad Company itself could appear before the court and demand the money in the receiver's hands. And if the company cannot do this, neither can any party whose claim is based, as Holland's is, only upon the company's rights."

What Judge BRADLEY calls a "strange doctrine" is precisely what the plaintiff below claims in the case at bar, viz.: that he can enforce a right in the property, created while the property was in the custody of the law, which right shall relate back and antedate both the seizure and the claim under which the seizure was made.

If real estate in the custody of the court by sequestration be sold for valuable consideration to a third party, such title will not prevail against the sequestration.

Bird v. *Littlehales*, 3 Swanst. 299.

In an anonymous case, 6 Ves. Jr. 287, Lord ELDON held that in the case of a receivership a mortgagee hav-

ing a clear right to possession must come in and be examined *pro interesse suo* the same as in case of a sequestration.

In *Coulson* v. *Gardiner*, 3 Swanst. 279, Lord NOTTINGHAM said: "In the next place it must be observed that sequestration is not like any process at common law, nor is it awarded in imitation of any of those processes. 1. For first it is not like a *levari facias* which ceases by the death of the party. 2. It is not like an outlawry when the profits are seized for the contempt but do not necessarily go in satisfaction of the debt. 3. It is not like an execution upon the Statute Westminster 2 or an extent: for though an injunction for the possession be like a *liberate*, yet it covers the whole and reaches copy-holds which no extent does. So that it is a special remedy warranted by the course of the court and stands only upon its own rules."

In *DeWinton* v. *The Mayor of Brecon*, 28 Beav., 200, the Master of the Rolls required a judgment creditor of the defendant to whom the receiver, as garnishee, had paid money by order of a court of law, to repay it and both he and the receiver were adjudged to pay the costs. The Master of the Rolls said, p. 203: "The Court is obliged to keep a strict hand over property in the hands of a receiver, or which by virtue of the order of the Court may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties."

The authorities cited and many more which might be added show that no device either of the debtor, his creditors or any other claimant has been allowed to

prevail over the power of the Court to protect real property in its custody for the benefit of its suitors and those to whom it is found rightfully to belong.

In no department of Judicial Administration have Courts been more jealous of any infringement upon their authority or more firm in upholding it than in the administration by Courts of Chancery of property in their custody through receivers. Yet if the position of the State Court is correct, the issue and sale of mortgage bonds criminally effected while the Court is in possession may wrest the property out of the hands of the Court, and render its authority vain and its decrees fruitless.

We submit that the interests of commerce do not demand that the Courts shall go thus far.

Again when in a suit for the foreclosure of a railroad mortgage a court of chancery appoints a receiver, there is a seizure of something more than the mere tangible property and credits. The franchises of the corporation become vested in the receiver and thereafter are exercised by him under the orders of the Court. The corporation is not dissolved ; it still has a naked existence, but this primary franchise, viz.: the right to exist as a corporation is all that is left to it.

> Thompson Commentaries on the Law of Corporations 7002.
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> *Central Trust Co.* v. *New York, &c., R. R. Co.*, 110 N. Y., 250.

In the latter case, a foreclosure suit in which a receiver had been appointed, PECKHAM, J., held that in such case the receiver as an officer of the Court exer-

cises the franchises which have been conferred upon the corporation by the State, and that through the Court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. On this ground the Court held that a state tax on the franchise must be paid by the receiver in preference to the rights of the mortgagees.

The Court held that the franchise was the same in both cases, only in one case it was used for the company and by it, by means of its board of directors, while in the other the same franchise was used and the road operated under it by an officer of the Court until, by virtue of the legal proceedings, the receiver is discharged and the road returned to its former possessor or it is otherwise disposed of by reorganization or sale.

In the case at bar the mortgage to Roosevelt and Fosdick covered all the property and franchises of the corporation (except the franchise of existence which could not be alienated), which passed to and became vested in the receivers at their appointment, from which time all the corporate power to maintain and operate the railroad and contract with reference thereto was exercised by the receivers until the property and franchise were sold and conveyed to the purchaser.

The power of the corporation to contract with reference to the railway and its property was as effectually taken away as though a decree of dissolution had passed. What the corporation acting through its board of directors could not do, could not, it is manifest, be done by the unauthorized and criminal act of any other person.

Fourth—But there is another reason in this connection why, as we think, the claim of plaintiff below should be denied.

At the time Mr. Lynde purchased the bonds in question in 1878 he had actual notice that the railway was in the hands of receivers.

From 1871 down to the time he purchased these bonds he had held some of the 821 bonds validly issued, secured by the Parkhurst mortgage. The interest on these bonds became in default in 1875 after the receivers were appointed, and was not paid until after June, 1875, when it was paid to him by the receivers. (Rec. p. 39, Par. XLIV.)

Again, in October, 1878, and in April, 1879, A. Iselin & Co., acting for the receivers, but in ignorance of the facts as to the issue of these disputed bonds, paid Mr. Lynde the interest coupons upon them, but in October, 1879, the facts had come to light and further payment was refused (Rec., p. 39, Par. XLIII.) But the foreclosure suit then pending continued and was not finally disposed of by a sale of the road until January, 1883, more than three years thereafter. When Mr. Lynde discovered that the validity of his bonds as a lien upon the property was disputed it was his duty to have applied to the Court having possession of the property to be examined *pro interesse suo* to the end that the Court administering the fund might determine whether he held a valid lien for the payment of his bonds and order the road sold subject to them.

In *Wiswall* v. *Sampson*, 14 How., 52, this Court, Mr. Justice NELSON, delivering the opinion, said (p. 65):

"The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the Court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate.

"And the mode of proceeding is the same in the case of the receiver, 6 Ves., 287; *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgage, if desirous of enforcing it against the estate after it has been taken into the care and custody of the Court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the Court for this purpose. The Court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

* * * * *

"The settled rule, also, appears to be, that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the Court pending the litigation by the appointment of a receiver,

or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even if for a valuable consideration, comes in at his peril. 3 Swanst., 278, n, 298, n; 2 Daniel's Pr., 1267; 6 Ves., 287; 9 *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1894.

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the Court, and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in Court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the Court to see that such application is made. *And in order to effect this, the Court must administer it independently of any rights acquired by third persons, pending the litigation.* Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.

"It is true, in administering the fund, the Court will take care that the rights of prior liens or encumbrances, shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the Court will be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

"We agree that the person holding the prior legal lien or encumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the Court.

"This notice can be readily given on the report of the master, of the prior liens or incumbrances resting upon the estate.

"But it is not necessary to go this length in the case before us, as it is sufficient to say, that the sale under the judgment, pending the equity suit, and while the Court was in possession of the estate, without the leave of the Court, was illegal and void. We do not doubt but that it would be competent for the Court, in case the judgment creditor, holding the prior lien, had not come in and claimed his interest in the equity suit, to decree a sale, in the final disposition of the fund, subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the Court. The right of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

By the refusal of the receivers to pay the interest on the bonds from October, 1879, until the road was sold in January, 1883, Mr. Lynde had notice that the validity of his bonds and of his lien was disputed.

Having actual knowledge of the pendency of the suit he is chargeable with knowledge of all the proceedings therein. He knew that it would be impossible for the Court to determine the amount of the fund due to Roosevelt and Fosdick under their mortgage without first ascertaining whether his bonds were valid or not. But during all those years he took no steps to establish their validity, but suffered the proceedings to go on and the road to be sold subject only to the Parkhurst bonds which were a lien at the commencement of the suit. At any time during that period he had the right, as it was his duty, to apply to the Court to be examined as to his title, and if the same had been adjudged valid the road would have been sold subject to the lien of the bonds in question as well as the rest, and the purchaser would not have been defrauded. As the matter stands, and should his claim be allowed to prevail, Roosevelt and Fosdick will have received $36,000 more than their due out of the fund and plaintiff in error be compelled to pay that much more than the contract price.

Fifth—It may be claimed that the receivers were negligent in not preventing the fraudulent negotiation of these bonds by requiring them to be delivered into their hands or cancelled. It is not improbable that they did make sufficient inquiry and received assurance that the unissued bonds were no longer in existence. Prevarication or even perjury in such matter on the part of Smith, the President of the road, would have been as likely as that he would afterwards embezzle the bonds and their proceeds.

In *Arnold* v. *The Cheque Bank*, 1 C. P. D. 578, the negligence relied on was in the custody of a draft, which a clerk had obtained possession of and stolen. Says Lord COLERIDGE, C. J., delivering the opinion (p 588):

"There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious theif."

In *Chipman* v. *Tucker*, 38 Wis. 43, the question arose upon the wrongful issue, by a custodian, of a promissory note which subsequently came, bona fide, into the hands of the plaintiff. Defendant had judgment. Upon the question of negligence, the court say:

"It appears that Rowley was an old resident of the place, and one of the leading merchants in business there at the time. He stood wholly indifferent between the company and the makers of these securities; and it would be unreasonable to impute negligence to the defendant because he did not suspect the fidelity or integrity of such a man, and deal with him as though he were already proven to be a knave."

In *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389, the trustees had intrusted the possession of their corporation seal to their secretary, who, during several years, fraudulently affixed it to five separate powers of attorney, authorizing the transfer of stock in the Bank of Ireland, belonging to the corporation, and upon which the bank had made transfers. Said Mr. Baron PARKE, delivering the opinion of the Judges in the House of

Lords, in an action brought against the bank by the trustees, for the conversion of the stock:

"Now we all concur in the opinion that the evidence given which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Mr. Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void."

"Is it not a rule that everyone has a right to suppose that a crime will not be committed, and to act on that belief?"

Baxendale v. *Bennett*, 3 Q. B. D., 525, 530, BRAMWELL, L. J.

Board of Education v. *Sinton*, 41 Ohio St., 504.

But it is furthermore clear that the receivers were not the agents of the purchasers and that the negligence of the former could not be imputed to the latter.

Sixth—The rule is elementary that all liens acquired upon the subject matter of the suit *pendente lite*, are cut off by the decree.

On the other hand it is equally clear that the doctrine of *lis pendens* does not apply to *commercial paper.*

The first is the general rule, the latter is an exception to it.

In the case of *Warren Co.* v. *Marcy*, 97 U. S., 96, Mr. Justice BRADLEY says:

"It is a general rule that all persons dealing with property, are bound to take notice of a suit with regard

to the title thereto and will, on their peril, purchase the same, from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way."

Further, quoting from the case of *Kiefer* v. *Ehler*, 18 Pa. St., 388, he gives the reason why the doctrine does not apply to negotiable instruments as follows:

"Unlike all other property *they carry their whole evidence of title on their face*, and the law assures the right of him who obtains them for valuable consideration, by regular indorsement and without notice of the adverse claim or of such suspicious circumstances as should lead to inquiry."

But as to real estate referring to the case of *Murray* v. *Ballon*, 1 Johns. Ch., 566, he says: "That case related to land with regard to which the rule is universally applied."

The doctrine of *lis pendens* as relating to real estate is founded upon its necessity for the authoritative administration of justice. In the leading case of *Murray* v. *Lylburn*, 2 Johns. Ch., 441, quoted from at length by Justice BRADLEY, Chancellor Kent says: "There is no principle better established nor one founded on more indispensable necessity than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit who are not to receive any prejudice from the alienation."

In *Metcalf* v. *Pulvertoft*, 2 Ves. & Beam, 199, the Vice Chancellor said:

"The *lis pendens* is presumptive if not actual notice and the purchaser is in the same situation in which the vendor stood; upon this plain principle, that the suit is to be decided according to the state of things when *it was instituted;* and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary act of either party.

"This is the principle running through all the cases, both at law and in Equity."

In *Gaskill* v. *Durdin*, 2 Ball & Beatty, Irish Chancery, 167, the Lord Chancellor said:

"The rule of this Court undoubtedly is that any interest acquired in the subject matter of a suit, pending the suit, is so far considered a nullity, that it cannot avail against the plaintiff's title, and if this rule were not attended to there would be no end to any suit, the Justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. *It is extremely difficult to draw any line, and very dangerous to allow of the rule being frittered away by exceptions.*"

We have not been able to find any case in which the exception to the rule of *lis pendens* in favor of commercial paper has been extended to include a mortgage lien to secure such paper acquired during the pendency of the suit.

In the case of a purchase of bonds of an insolvent railway company in the hands of a Court of Chancery for the just administration of its assets, the inconveniences to the commercial world of requiring the purchaser to ascertain that they were issued before the

sequestration of the property, would, we respectfully submit, be less harmful than to admit that the Court having seized the property, is unable to administer it for the benefit of those to whom it rightfully belongs.

Respectfully submitted,

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